STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Supreme Court No_____

Court of Appeals No. 320560

Plaintiff-Appellant

Lower Court No. 13-00380 FH

-vs-

AMDEBIRHAN ABERE ALEMU

Defendant-Appellee

_____/

KENT COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant

_____

ANNE YANTUS (P 39445)
Attorney for Defendant-Appellee

_____

DEFENDANT-APPELLEE'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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Court of Appeals made no answer.

Trial Court made no answer.

Defendant-Appellee answers, "Yes".

II. DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE REQUEST FOR DIVERSION UNDER MCL 333.7411 WHERE THE CRIME WAS MINOR –MISDEMEANOR POSSESSION OF MARIJUANA - AND THE DEFENDANT WAS THE PERFECT CANDIDATE FOR DIVERSION?

Court of Appeals answers, "Yes".

Trial Court made no answer.

Defendant-Appellee answers, "Yes".

COUNTER STATEMENT OF FACTS

Defendant-Appellee Amdebirhan Alemu pleaded guilty to the misdemeanor offense of possession of marijuana, MCL 333.7403(2)(d), on March 26, 2013, in the Kent County Circuit Court. The Honorable Dennis B. Leiber sentenced Mr. Alemu to a term of one year probation and a $1,000 fine on May 23, 2013.

As part of a plea bargain, the prosecutor agreed to dismiss the initial charge of possession with intent to deliver marijuana in exchange for Mr. Alemu's guilty plea to the added charge of possession of marijuana. (3/26/2013 T 5-6) The prosecutor also agreed to take no position on the request for deferral of proceedings under MCL 333.7411. (3/26/13 T 6)

The facts are undisputed. On December 23, 1012, Grand Rapids Police found Mr. Alemu parked in his vehicle talking on his phone at the Cambridge Square Apartment complex. (PSI[1] 2) The officer approached Mr. Alemu and questioned him as to his purpose for being in the parking lot. (PSI 2-3) The officer spotted a box of clear plastic sandwich bags within the vehicle. (PSI 2) The officer's prior experiences, coupled with the fact that the Cambridge Square Apartment complex had a no trespass letter on file with the department, prompted the officer to arrest Mr. Alemu for trespassing. (PSI 2) Mr. Alemu then consented to a search of his vehicle, which search produced a glass jar containing marijuana, a plastic bag containing a small amount of marijuana, and a digital scale. (PSI 2) Mr. Alemu denied selling any drugs, and stated that the marijuana was for his own use and for friends who were home from school for the holidays. (PSI 2) Mr. Alemu was subsequently taken to the Kent County Jail without incident. (PSI 2)

At sentencing, Mr. Alemu requested, and the presentence investigator recommended, that

[1] PSI refers to presentence investigation report.

his case be diverted under MCL 333.7411. (5/23/13 T 4) However, based on the presence of plastic bags and a scale, and because the trial judge believed Mr. Alemu to have possessed a pound of marijuana, the trial judge denied the request. (5/23/13 T 7) In fact, Mr. Alemu possessed less than an ounce of marijuana. [2] (PSI 2-3)

With the assistance of appellate counsel, Mr. Alemu filed a post-conviction motion to correct the sentence. He identified the trial court's mistake as to the amount of marijuana, and asked the court to reconsider placing Mr. Alemu on probation with deferral under MCL 333.7411. Judge Leiber denied the request, reasoning that while there was a mistake as to the amount of marijuana, the court's intent was to deny 7411 status but to consider expunction after five years pursuant to the adult expunction statute (MCL 780.621). (2/14/14 T 4, 12-13)

Mr. Alemu filed a delayed application for leave to appeal on February 27, 2014. The Court of Appeals granted leave to appeal on May 1, 2014. The Court of Appeals reversed by means of an unpublished opinion date July 7, 2015, with a majority of the court concluding that while the trial judge had wanted the defendant to "earn" dismissal of the conviction by means of the adult expunction statute, the trial judge had failed to recognize that an offender must "earn" dismissal of the charge with deferral under MCL 333.7411. *Court of Appeals Opinion*, Appendix A. The Honorable Jane E. Markey dissented, concluding that deference should be given to the trial court's decision. *Id.*

The prosecutor, despite the terms of the plea bargain, filed an application for leave to appeal on September 1, 2015.

[2] He possessed 23.61 grams (PSI 2-3). There are 28.35 grams to an ounce. Webster's Ninth New Collegiate Dictionary (Merriam-Webster, 1987) p. 1338.

I. THE PROSECUTOR HAS BREACHED THE TERMS OF THE PLEA BARGAIN BY FILING THIS APPEAL; MOREOVER, THERE IS NO JUSTICEABLE CONTROVERSY AS THE PROSECUTOR IS NOT AN AGGRIEVED PARTY.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE REQUEST FOR DIVERSION UNDER MCL 333.7411 WHERE THE CRIME WAS MINOR – MISDEMEANOR POSSESSION OF MARIJUANA - AND THE DEFENDANT WAS THE PERFECT CANDIDATE FOR DIVERSION.

This Court should dismiss the prosecutor's application for leave to appeal as the attempt to appeal represents a breach of the plea bargain. The prosecutor promised to "take no position on 7411 [deferral of conviction under MCL 333.7411]" as part of the plea bargain. (3/26/13 T 6) The prosecutor honored its agreement throughout the earlier proceedings when the request for 7411 status was denied. The prosecutor now files this application for leave to appeal because the defendant prevailed in the Court of Appeals. This appeal is a shameful attempt to "correct" an outcome with which the prosecutor disagrees.

While the prosecutor mentioned the potential breach of the bargain in its application for leave to appeal (see page 2), it failed to acknowledge to case of *People v Arriaga,* 199 Mich App 166; 501 NW2d 200 (1993). In *Arriaga,* the Court of Appeals dismissed a similar prosecutor's appeal because the prosecutor promised to take no position regarding a departure below the sentencing guidelines range, but then appealed when the trial judge departed below the range. The *Arriaga* court dismissed the prosecutor's appeal:

> The prosecutor's appeal from the lawful sentence constitutes a breach of the agreement with defendant. We refuse to condone the breach by evaluating the trial court's discretion in sentencing defendant as it did. [*Id.* at 169.]

The Kent County Prosecutor seeks to reframe this issue as a broader request for "clarification" of the abuse of discretion standard for all deferral proceedings in criminal cases. Defendant believes the prosecutor is seeking an end run around the plea bargain and there is no need for clarification. Even if there were need for clarification, the prosecutor should seek a case in which it has an interest as an aggrieved party (and perhaps a case involving a published decision of the Court of Appeals).

Accordingly, the Court should find a breach of the plea bargain and dismiss the application for leave to appeal. *Arriaga, supra.* See also *Santobello v New York*, 404 US 257 (1971); US Const, Am XIV; Const 1963, art 1, § 17.

The prosecutor's application is also precluded by traditional case and controversy requirements. The prosecutor is not an aggrieved party in this case. "An aggrieved party is not one who is merely disappointed over a certain result." *Federated Ins Co v Oakland County Road Com'n*, 475 Mich 286, 291; 715 NW2d 846 (2006). "[To] have standing on appeal, a litigant must have suffered a concrete and particularized injury . . . ." *Id.* at 291. A party's "interest in the proper enforcement of a statute has never been thought sufficient to confer standing . . . ." *Id.*, at 291 n 4.

Here, the Kent County Prosecutor had no stake in the defendant's request for 7411 status under MCL 333.7411 as it agreed to take no position on this request as part of the plea bargain. It has suffered no injury as a result of the Court of Appeals decision.

The prosecutor's interest is merely academic and does not reflect a "concrete and particularlized injury." This Court concluded in 2011 that an appeal that presents "nothing but abstract questions of law" is moot:

> "T[he] judicial power ... is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." Anway v. Grand Rapids R. Co., 211 Mich. 592, 616, 179 N.W. 350 (1920) (quoting Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 [1911]) (emphasis added). As a result, "this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before" it. Federated Publications, Inc. v. City of Lansing, 467 Mich. 98, 112, 649 N.W.2d 383 (2002). In accordance with these principles, this case is moot because it presents "nothing but abstract questions of law, which do not rest upon existing facts or rights." [*Anglers of Au Sable, Inc v Department of Environmental Quality*, 489 Mich 884; 796 NW2d 240 (2011).]

As the Court does not offer advisory opinions,[3] it should dismiss this application for leave to appeal and consider assessing costs against the Kent County Prosecutor for the waste of taxpayers' money. MCR 7.316(D).

While the Court should not reach the merits of this appeal, Mr. Alemu would note he is deserving of the relief granted by the Court of Appeals.

This case involves a preserved request for placement on probation under the deferred conviction process of MCL 333.7411. (5/23/13 T 4) The trial court denied the request at sentencing and also in response to a timely post-conviction motion. (5/23/13 T 9; 2/14/14 T 12-13) The Court of Appeals reversed by unpublished opinion dated July 7, 2015. *Court of Appeals Opinion*, Appendix A.

The trial court has discretion to sentence an offender to probation without a conviction under MCL 333.7411. *People v Ware*, 239 Mich App 437, 441 (2000). The trial court's exercise of discretion is reviewed for an abuse of discretion. See *People v Khanani*, 296 Mich

[3] The Court does not offer advisory opinions with respect to issues not ripe for review. *Detroit Fire Fighters Ass'n v Detroit*, 408 Mich 663, 697 n 15; 293 NW2d 278 (1980) (Williams, J., for affirmance in part, reversal in part). According to the Michigan Constitution, the Court has the power to offer advisory opinions regarding the constitutionality of legislation when requested to do so by the state legislature or governor. Const 1963, art 3, § 8; *In re Requet for Advisory Opinion of Constitutionality of 1975 PA 227*, 395 Mich 148, 149; 235 NW2d 321 (1975).

App 175, 177-178 (2012) (decision to grant status under Holmes Youthful Trainee Act reviewed for abuse of discretion). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217 (2008).

The Court of Appeals properly reversed the trial judge's refusal to divert the case from the conviction process under MCL 333.7411. Mr. Alemu presented as the perfect candidate for diversion status. Moreover, the trial court's stated reason – that Mr. Alemu could petition for expunction five years after the sentence was served – fails to recognize the purpose of statutory diversion programs.

Mr. Alemu pleaded guilty to possession of marijuana, a misdemeanor offense under MCL 333.7403(2)(d). He did so in exchange for the prosecutor's promise to dismiss the initial charge of possession with intent to deliver marijuana. (3/26/13 T 5-6) Additionally, as part of the plea agreement, the prosecutor agreed to take no position on 7411 status (i.e., disposition under MCL 333.7411). (3/26/13 T 6)

The presentence investigator recommended that Mr. Alemu be given 7411 status. (PSI 2) Defense counsel asked the court to follow that recommendation. (5/23/13 T 5) Mr. Alemu spoke of his "stupid" behavior and his desire to continue with his education. (5/23/13 T 5) He had previously informed the trial judge during the plea proceeding that he was an undergraduate student at the University of Michigan and planned to attend dental school at the graduate level. (3/26/13 T 3-4) The trial judge denied the request for 7411 placement at sentencing, relying in part on the "pound" of marijuana found in the car:

> [THE COURT:] I appreciate what he is telling you Mr. Parker. I am totally incredulous this University of Michigan student who is bright and capable is trying to tell me that he has a glass jar with a *pound of marijuana* and a box of sandwich baggies that's open, a

> digital scale in his door, and he's just doing this to decant a small, usable amount anytime he goes from home to home to visit friends over the holiday.
>
> Now, that doesn't seem like simply just taking a small amount just to use with your friends. It seems to me in this apartment complex where you were, that you were providing a means to dispense to the willing. That's how it comes across to me.
>
> Now, I have to determine credibility. Maybe I'm wrong. I don't believe you. You're sure you want to stick with that?
>
> THE DEFENDANT: Yes, your Honor. The reason I was in the apartment complex was because I was talking on the phone with my girlfriend, and I decided to just pull over. I was not there to do anything else.
>
> THE COURT: I see. * * * I'm putting you on probation for a year. * * * For this one year that you're on probation to me, you will follow all other recommendations plus permit entry into your home . . . and you will pay a fine of $1,000. That's the cost for this choice.
>
> * * *
>
> MR. PARKER: Is the Court granting 7411?
>
> THE COURT: I am not. [5/23/13 T 7-9.]

By post-conviction motion, Mr. Alemu moved to correct the trial court's misperception of the facts. There was not a pound of marijuana, but in fact 23 grams – less than an ounce. [4] (PSI 2-3) Mr. Alemu also reiterated his explanation for the crime: that he was going to share the marijuana with friends over the winter holidays. (2/14/14 T 8-9) The instant offense occurred on December 23, 2012, as Mr. Alemu was driving home to Grand Rapids from Ann Arbor for the holiday break. (PSI 2-3) Despite this explanation, and despite correction of the amount of marijuana, the trial judge again denied 7411 status. Judge Leiber explained that he was denying the request not because of the digital scale in the car or the earlier colloquy with the defendant.

[4] The presentence report contained contradictory information as to the amount of marijuana, first reporting the officer's perception that there was a pound and then reporting the actual weight of 23.61 grams. (PSI 2-3) In response to the post-conviction motion, the trial judge ordered correction of the report to strike reference to the "pound" of marijuana. *Order*, Appendix B.

(2/14/14 T 12-13) Rather, he was denying the request because he wanted Mr. Alemu to wait five years before he could petition for formal expunction (presumably under the adult expunction statute, MCL 780.621):

> [THE COURT:] But in any event, he's taking advantage of this sobering reality and making important and we hope long-lasting change in his life.
>
> I believe incentives matter. And with regard to section 7411, my decision not to grant it was not based on any quantity stated or any colloquy between the defendant and myself. My decision not to grant it was the recognition that at twenty years of age, this young man had no prior criminal record, that the amount involved – he had no history of trafficking in drugs or narcotics or any other kind of substance abuse, had an education that was well grounded and the potential of a bright future.
>
> Incentives matter, as I say, and I'm saying now that which I had in mind when I fashioned the sentence was to give to the defendant the opportunity for expungement under a different section of the law, namely: the general statute which requires a five-year period of abstinence, except for minor offenses, and the subsequent consideration presuming that he continues in the path that he has chosen. [2/14/14 T 12-13.]

Judge Leiber nevertheless acknowledged that Mr. Alemu was doing well, had matured and was taking advantage of the opportunities in his life. (2/14/14 T 12) The trial judge conceded there was less than an ounce of marijuana found in Mr. Alemu's car. (2/14/14 T 4)

The trial court's decision represents an abuse of discretion given this offender's age, academic standing, lack of prior record, minor nature of the offense and the very purpose of the statutorily-authorized diversion program.

MCL 333.7411 offers the court the ability to place a first time offender, charged with certain low-level drug offenses including possession of marijuana, on probation without an adjudication of guilt. Upon successful completion of the terms and conditions of probation, the court must discharge the individual and dismiss the proceedings:

> Sec. 7411. (1) When an individual who has not previously been convicted of an offense under this article or under any statute of the United States or of any state relating to narcotic drugs, coca leaves, marihuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under section 7403(2)(a)(v), 7403(2)(b), (c), or (d), or of use of a controlled substance under section 7404, or possession or use of an imitation controlled substance under section 7341 for a second time, the court, without entering a judgment of guilt with the consent of the accused, may defer further proceedings and place the individual on probation upon terms and conditions that shall include, but are not limited to, payment of a probation supervision fee as prescribed in section 3c of chapter XI of the code of criminal procedure, 1927 PA 175, MCL 771.3c. The terms and conditions of probation may include participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1084. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings. Discharge and dismissal under this section shall be without adjudication of guilt and, except as otherwise provided by law, is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section 7413. There may be only 1 discharge and dismissal under this section as to an individual. [MCL 333.7411(1).]

The "apparent purpose of . . . [7411] . . . is to grant trial courts discretion to provide an ultimately noncriminal sanction for first-time offenders who commit less serious drug crimes." *People v Ware*, 239 Mich App at 441.

As MCL 333.7411 makes clear, the trial court may place the offender on probation in order to monitor the offender's behavior over a period of time.

Mr. Alemu was (and continues to be) the perfect candidate for placement on 7411 status. He was a first time offender who had no prior convictions and no prior arrests. (PSI 3-4) He was 20 years old at the time of sentencing and is now 22 (PSI coverpage). He was convicted of the misdemeanor offense of possession of marijuana. MCL 333.7403(2)(d). The prosecutor did not

oppose 7411 placement, and the presentence investigator recommended it. (3/26/13 T 6; PSI 1-2)

Mr. Alemu was a full-time student at the University of Michigan majoring in psychology and hoping to attend dental school. (3/26/13 T 4; PSI 1) He worked as a research assistant for Dr. Martia Inglehart. (PSI 1) He completed a marijuana education program before pleading guilty. *Kent County Court Services Update Status Report*, Appendix C (this document is found in the circuit court file). He accepted full responsibility for his actions and pleaded guilty a mere three months after arrest. (3/26/2013 T 8; PSI 1)

This Court has stated that "criminal punishment must fit the offender rather than the offense alone and that sound discretion must be exercised in sentencing matters." *People v Triplett*, 407 Mich 510, 513 (1980) (citing *People v McFarlin*, 389 Mich.557, 574 (1973). Assessment of the offender is more important than assessment of the offense in many ways. *People v Mazzie*, 429 Mich 29, 33 (1987) ("Under our present framework of indeterminate sentencing, sentences are based more on an assessment of the offender than the offense."). Moreover, "the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential." *McFarlin*, 389 Mich at 574.

As the case law makes clear, the trial judge was required to consider Mr. Alemu's personal circumstances and the lack of a prior record when imposing sentence. Here, those circumstances were all exemplary. Mr. Alemu was an intelligent young man with no prior record – not even a single prior arrest. He completed a marijuana substance abuse class before the guilty plea, and complied with all terms and conditions of his probation after sentencing. (2/14/14 T 5). During the appeal process, he continued to work and attend classes as a full-time student, and was selected as Programming Chair for the University of Michigan's Black Student

Union. *Letter from Tyrell Collier, President of Black Student Union,* Appendix D (this letter was attached to defendant's post-conviction motion). His excellent post-sentence behavior led the trial judge to remark that he was doing well and taking advantage of the opportunities presented to him. (2/14/14 T 12) For this very reason, the trial judge indicated he would (and subsequently did) grant an early discharge from probation. (2/14/14 T 14)

In effect, the trial judge gave this defendant a nine-month probationary term. The order granting an early discharge from probation reflects termination of probation "with improvement." *Motion and Order for Discharge of Probation (with Improvement),* Appendix E. Yet the judge denied 7411 diversion status because the judge wanted to monitor Mr. Alemu's behavior for a longer period of time. This decision is hard to reconcile with the early discharge from probation and an offender who appeared most likely to learn his lesson from the criminal justice system and most deserving of an opportunity for diversion.

Trial courts routinely grant 7411 diversion status for young offenders charged with minor offenses. This is true not only for marijuana offenses, but for some cocaine and other drug crimes. See *People v. Benjamin*, 283 Mich App 526, 527 (2009) (7411 status for possession of less than 25 grams of cocaine); *Carr v Midland County Concealed Weapons Licensing Bd.*, 259 Mich App 428, 430-31 (2003) (7411 status for obtaining a controlled substance by fraud); *People v Ware, supra* (holding 7411 status not precluded for simultaneous convictions of conspiracy to deliver marijuana and possession of cocaine).

Mr. Alemu would have been eligible for diversion under the Holmes Youthful Trainee Act as well. He was 20 years old at the time of the crime, and misdemeanor marijuana possession is an eligible crime. See MCL 762.11 *et* seq. The Court of Appeals has repeatedly acknowledged and approved HYTA placement for individuals convicted of crimes more serious

than possession of marijuana. See *People v Giovannini*, 271 Mich App 409, 410 (2006) (remanded for reconsideration of HYTA placement for 17 year old who committed two separate second-degree home invasion offenses); *People v Bobek*, 217 Mich App 524, 532 (1996) (HYTA for world class skater who pleaded guilty to first-degree home invasion); *People v Bandy*, 35 Mich App 53 (1971) (remanded for reconsideration of HYTA status for unarmed robbery).

Judge Leiber indicated his intent to consider a request for expungement five years after the sentence was completed. (2/14/14 T 13) He referred to the belief that "[i]ncentives matter." (2/14/14 T 12, 13) But there was no recognition that the court could place this young man on probation under MCL 333.7411 for more than a year to monitor the offender's behavior and provide an incentive, namely successful completion of probation without a conviction. [5]

The trial judge's reasoning would appear to preclude 7411 status for most if not nearly every low-level drug offender (the same would be true for young offenders requesting placement under HYTA, at least before this particular judge).

The Court of Appeals correctly held that the trial judge abused his discretion by failing to appreciate the statutory diversion process under MCL 333.7411 and the earned nature of the statutory remedy:

> We agree with defendant that the trial court abused its discretion in denying deferral under § 7411(1). At the February 14, 2014 hearing, the trial court clarified that its decision to deny deferral was not rooted in the erroneous PSIR report stating that defendant possessed a pound of marijuana, or in its colloquy with defendant regarding his intent to sell the marijuana. Rather, the court stated that it would deny deferral under § 7411(1), "giving [defendant] the

[5] The trial judge made no distinction between misdemeanor and felony convictions in his analysis. As a general rule, there is a shorter period of probation available for misdemeanants under the general probation statute, MCL 771.2, although the available length of probation under MCL 333.7411 is undefined. The maximum period of probation for HYTA youthful offenders (i.e., offenders under 21 years of age) is three years. MCL 762.13(1)(b). The trial judge did not rely on the length of probation as a reason for denying defendant's request, and defendant would note that individuals convicted of misdemeanor offenses would appear to be *more* deserving of leniency than those convicted of a felony offense.

> opportunity to earn it [expungement] as a matter of fact as opposed to granting it when his future is still uncertain." The trial court's stated reason for denying deferral – making sure that defendant "earn[ed] it" – *is the very purpose of § 7411(1)*. In order for a defendant to have the proceedings dismissed without an adjudication of guilt under § 7411(1), he or she must "earn it." Any violation of probation allows the court to enter an adjudication of guilt. See MCL 333.7411(1). In other words, the defendant is to prove himself or herself. The defendant is not automatically entitled, under § 7411(1), to have the adjudication of guilt dismissed. The defendant, with a still uncertain future, must prove, by way of compliance with an order of probation, that he or she has earned a dismissal without an adjudication of guilt.
>
> By denying defendant's request for probation under § 7411(1) for the reason that he had to prove his worth, the trial court misapprehended the process for a deferred adjudication under the statute. The point of requiring a defendant to comply with probation before obtaining a dismissal without an adjudication of guilt is to make the defendant "earn it." Defendant, by requesting the procedure set forth under § 7411(1), was asking for the opportunity to "earn it." In essence, defendant was requesting the very thing that the trial court cited as its sole reason for denying the request for deferral proceedings under § 7411(1). In denying d efendant's request for this reason, the trial court misconstrued the deferral process set forth in § 7411(1) and necessarily abused its discretion. See *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012) ("A trial court necessarily abuses its discretion when it makes an error of law."); *Ware*, 239 Mich App at 442 (holding that the trial court abused its discretion when it misapplied § 7411(1)). Accordingly, we vacate defendant's sentence, including the adjudication of guilt, and remand for resentencing. *Ware*, 239 Mich App at 442. On remand, the case is placed in a presentence posture. See *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007); *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994). Thus, on remand, the trial court is to consider defendant's request for deferral proceedings under § 7411(1) and is to decide the request on its merits. See *Ware*, 239 Mich App at 442. [*Court of Appeals Opinion* pp 4-5, Appendix A.]

Mr. Alemu would make one final point: Post-conviction expungement is no substitute for diversion from the criminal justice system. The expungment process is open to those with a moderately severe felony conviction (and an additional two misdemeanor convictions) and

requires a wait of five or more years from completion of the sentence. MCL 780.621*et seq*. Diversion, on the other hand, is reserved for those who deserve leniency at the very outset of the criminal prosecution: the first-time offender for certain crimes,[6] the youthful offender,[7] and those committing a one-time, low-level drug offense.[8]

The trial judge's reasoning in effect ignores the damage to this offender's employment prospects during the five-year post-sentence waiting period under the expungment statute. It also ignores the the counter-productive nature of saddling this offender with a conviction of record while Mr. Alemu seeks to begin his adult career. Mr. Alemu graduated in 2014 from a respected university, but his criminal record will undoubtedly impair his employment prospects and future state licensing requests. [9] As the Court might imagine, a prior drug conviction, even one for marijuana, can have severe consequences on an applicant's efforts to be admitted to dental school. Dentists are licensed to administer controlled substances as part of their work,[10] and only 41% of all applicants to dental school were accepted and enrolled in 2010. ADEA (American Dental Education Association) Survey of U.S. Dental School Applicants and Enrollees, available at:http://www.adea.org/publications/library/ADEAsurveysreports/Pages/ADEASurveyofUSDentalSchoolApplicantsandEnrollees20102011.aspx (accessed 2-25-14).

Beyond obstacles in gaining acceptance to an accredited dental school, there is a state licensing process for dentists that requires disclosure of a misdemeanor marijuana conviction.

[6] Domestic violence, MCL 769.4a, and parental kidnapping, 750.350a(4).
[7] The Holmes Youthful Trainee Act, MCL 762.11 *et seq.*
[8] MCL 333.7411.
[9] Many statutes require a "criminal records check" including: MCL 15.183(9)(d) (school board members); MCL 28.515 (carrying concealed weapon by retired law enforcement officer); MCL 333.21313 (owner or operator of home for aged); MCL 380.1230a (school employees); MCL 400.713 (adult foster care); MCL 722.15 (child care organization); MCL 722.115 (foster care).
[10] *See* *http://www.michigan.gov/lara/0,4601,7-154-35299_63294_27529_27533---,00.html*.

See MCL 333.16174 (criminal records check for health care license); MCL 333.16177 (dentist and other health care providers must report misdemeanor conviction for possession of controlled substance when applying for or renewing health care license). *See also* MCL 333.13522 (referring to state and federal regulations for use of radiation by dentists).

Mr. Alemu was a 20-year-old offender who was the perfect candidate for 7411 deferral. He had no prior record and the crime was minor. He was a full-time student with a promising career. The crime reflects youthful indiscretion at a time when young people make mistakes. To saddle him with a drug conviction that may preclude a promising career represents an unreasonable and unprincipled outcome. Ironically, the trial judge will now have the benefit of appellate delay as Mr. Alemu can show nearly three years of crime-free behavior. For all the above reasons, this Court should affirm the decision of the Court of Appeals or deny leave to appeal.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellee asks that this Honorable Court deny leave to appeal due to the prosecutor's breach of the plea bargain and the lack of a justiceable controversy or affirm the decision of the Court of Appeals.

Respectfully submitted,

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